

**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



October 10, 2002

10/24/2002

Agenda ID#1242

Alternate Order to Agenda ID# 996

**TO: PARTIES OF RECORD IN APPLICATION 02-05-006**

Enclosed is the Alternate Draft Decision of Commissioner Loretta Lynch to the Draft Decision of Administrative Law Judge (ALJ) Jeff O'Donnell previously mailed to you.

When the Commission acts on this agenda item, it may adopt all or part of it as written, amend or modify it, or set aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

As set forth in Rule 77.6(d), parties to the proceeding may file comments on the enclosed alternate at least seven days before the Commission meeting or no later than October 17, 2002. Reply comments are due by noon on October 21, 2002.

An original and four copies of the comments and reply comments with a certificate of service shall be filed with the Commission's Docket Office and copies shall be served on all parties on the same day of filing. The Commissioners and ALJ shall be served separately by overnight service. Please also provide an electronic copy of the comments to Tom Long at [tjl@cpuc.ca.gov](mailto:tjl@cpuc.ca.gov).

Carol Brown, Interim Chief  
Administrative Law Judge

Decision ALTERNATE DRAFT DECISION OF COMMISSIONER LYNCH  
(Mailed October 10, 2002)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Joint Application for Authority to Transfer  
Control of National Comtel Network, Inc.  
(U-5341-C) to Jeff L. Foss, an Individual.

Application 02-05-006  
(Filed May 1, 2002)

**OPINION APPROVING TRANSFER OF CONTROL**

**Summary**

This decision denies the joint application of National Comtel Network, Inc. (NCN) and Jeff L. Foss (Foss) for approval of the transfer of control of NCN to Foss.

**Parties to the Transaction**

NCN is a California corporation authorized to resell local exchange and interexchange services.<sup>1</sup> Its principal place of business is located at 18340 Ventura Boulevard, Suite 218, Tarzana, California 91356.

Foss is an individual whose principal place of business is located at the same address as NCN.

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<sup>1</sup> NCN was authorized to resell inter-Local Access and Transport Area interexchange services and local exchange services by Decision (D.) 93-11-038 and D.96-02-072, respectively.

**Proposed Transaction**

Pursuant to a letter of intent Foss purchased 100% of the issued and outstanding stock of NCN on or about December 31, 2001.

The applicants represent that the transaction will provide NCN with access to additional working capital. The applicants also represent that the transaction will be transparent to customers. There will be no change of name, and customers will continue to receive service under the same rates, terms, and conditions after the transaction is approved.

**Discussion**

Pub. Util. Code § 851 provides:

No public utility...shall sell...the whole or any part of its...plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder ... without having first secured from the commission an order authorizing it to do so. Every such sale . . . made other than in accordance with the order of the commission authorizing it is void (emphasis added).

Pub. Util. Code § 854(a) provides:

No person...shall...acquire...any public utility organized and doing business in this state without first securing authorization to do so from the commission. . . . Any . . . acquisition without that prior authorization shall be void and of no effect (emphasis added).

The purpose of these sections is to enable the Commission, *before any transfer of public utility property is consummated*, to review the situation and to take such action, as a condition of the transfer, as the public interest may require. (San Jose Water Co. (1916) 10 CRC 56.) In this instance, the transaction took

place before the applicants received, or even sought, the Commission's approval. Therefore, the applicants violated Sections 851 and 854.

The applicants represented that they were unaware of the requirements for advance approval of the transaction. As soon as they became aware, they filed this application. However, ignorance of the requirements is no excuse, especially for certificated utilities, which are required to make themselves aware of all applicable rules and regulations. Because the applicants did not seek prior approval of the Commission before transferring control of the utility, we must deny the application.

In addition, Sections 851 and 854 are clear that the purported transfer of control that took place on or about December 31, 2001, without the Commission's prior authorization, is "void and of no effect." The legislature's use of the word "shall" in Section 854(a) leaves us no choice but to declare the December 31, 2001 transaction void and of no effect.

If applicants wish to effectuate a change in control of the type addressed in their application, they will need to file another application seeking the Commission's approval of a transaction that has not yet been consummated. As Sections 851 and 854 require, no transfer of property or control may take place unless and until the Commission approves the transfer.

### **Request to File Under Seal**

The applicants request that the financial information filed with the application, and on June 10, 2002, be filed under seal. The financial information consists of MCN's financial statements, an offer to purchase by Foss, and a bank statement for Foss. The applicants represent that the information is proprietary and sensitive. The information, if revealed, would place them at an unfair

business disadvantage. We have granted similar requests in the past and will do so here.

**Procedural Matters**

In Resolution ALJ 176-3088, dated May 16, 2002, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. Therefore, a public hearing is not necessary, and it is not necessary to alter the preliminary determinations.

The Alternate Draft Decision of Commissioner Lynch was mailed on October 10, 2002. Opening comments were filed by \_\_\_\_\_ on \_\_\_\_\_ and reply comments were filed by \_\_\_\_\_ on \_\_\_\_\_.

**Findings of Fact**

1. The transfer of control for which authority is requested in the application took place on or about December 31, 2001 without prior Commission approval.
2. Public disclosure of the financial information filed under seal would place the applicants at an unfair business disadvantage.
3. Notice of this application appeared on the Commission's Daily Calendar on May 8, 2002.
4. No hearings are necessary.

**Conclusions of Law**

1. Since the transaction took place without prior Commission approval, the applicants violated Sections 851 and 854.
2. Sections 851 and 854 require us to declare the purported transfer of control on or about December 31, 2001 to be void and of no effect.

3. The applicants' request to have the financial information filed with this application, and on June 10, 2002, kept under seal should be granted.

**O R D E R**

**IT IS ORDERED** that:

1. The joint application of National Comtel Network, Inc. (NCN) and Jeff L. Foss (Foss) for approval of the transfer of control of NCN to Foss is denied.

2. The purported transfer of control from NCN to Foss on or about December 31, 2001 is void and of no effect.

3. The applicants' request to have the financial information filed with this application, and on June 10, 2002, kept under seal is granted for two years from the effective date of this decision. During that period the information shall not be made accessible or disclosed to anyone other than the Commission staff except on the further order or ruling of the Commission, the Assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge.

4. If the applicants believe that further protection of the information kept under seal is needed, they may file a motion stating the justification for further withholding of the information from public inspection, or for such other relief as the Commission rules may then provide. This motion shall be filed no later than one month before the expiration date.

5. This application is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.